

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

BEECH TREE RUN, INC.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
JUDITH KATES, AS EXECUTRIX OF	:	
THE ESTATE OF LEWIS KATES,	:	
Defendants	:	
	:	NO. 99-CV-5993

**M E M O R A N D U M**

Currently before the Court are plaintiff's Motion for Partial Summary Judgment and defendant's Motion for Summary Judgment. For the reasons stated below, this Court will grant plaintiff's motion in part and deny it in part, and grant defendant's motion in part and deny it in part.

**I. INTRODUCTION**

**A. Procedural History**

In 1986, Stewart Dickler contracted to purchase a former schoolhouse from the Wantagh Union-Free School District ("Wantagh"). Before the parties closed on the transaction, however, a fire destroyed a substantial part of the building. Wantagh had insurance on the School with Pacific Employers Insurance Company, a fully-owned subsidiary of CIGNA (referenced collectively hereinafter as "CIGNA"). Mr. Dickler and Wantagh continued with the purchase anyway, and Wantagh assigned to Mr.

Dickler its rights to the proceeds of any insurance recovery. Mr. Dickler, in turn, assigned those rights to Beech Tree, Inc., a company he formed with two associates to develop the Wantagh property. Hereinafter, Mr. Dickler and Beech Tree Run, Inc. are referenced collectively as "Beech Tree."

Mr. Lewis Kates, deceased, was the attorney whom Beech Tree retained to recover proceeds from CIGNA pursuant to the rights assigned by Wantagh. In the instant action, Beech Tree seeks declaratory judgment against the Estate of Mr. Kates regarding the distribution of money Mr. Kates recovered from Machne Israel, Inc. and Friends of Beth Rivkah Schools (jointly referenced hereinafter as "Machne Israel").

Machne Israel became involved in the underlying litigation as set forth below.

1. The "Underlying" litigation:

The case at bar arises out of two disputes that, while occurring within a single action, involved different parties and occurred at different times. Hereinafter, those two disputes are referenced as "the insurance dispute" and "the recovery action."

a. The Insurance Dispute

Beech Tree initiated the underlying litigation, Beech Tree Run, Inc., v. Pacific Employers Insurance Co., on June 27, 1990 to recover proceeds of the insurance policy issued by CIGNA. Mr. Kates represented Beech Tree in that action. The District Court

initially awarded damages of \$7,381,490. On appeal, the Court of Appeals for the Third Circuit held that the District Court's award was excessive because: (1) the District Court overestimated the building's replacement cost; and (2) the District Court failed to subtract the amount of physical depreciation to the building. On remand, the District Court determined that the actual cash value of the school was \$3,575,262. Accordingly, the Court ordered CIGNA to pay \$3,575,262 in compensatory damages, plus \$180,000 in demolition costs. The District Court's July 21, 1992 order was appealed, and was affirmed by the Court of Appeals for the Third Circuit on March 12, 1993.

On August 27, 1992, while the District Court's July 21, 1992 Order was on appeal, Beech Tree and Mr. Kates entered into an agreement (the "assignment agreement") with Machne Israel where Beech Tree assigned to Machne Israel its rights, title, and interest in all proceeds due from CIGNA, or to become due from CIGNA in the underlying litigation. Machne Israel agreed, inter alia, to use the insurance proceeds to construct a school in the Crown Heights section of Brooklyn, New York containing approximately 54,000 square feet, to name the school in honor of Dr. Abraham and Pauline Kates and Dr. Edward Wasserman, and to make Stewart Dickler and Judith Anne Kates permanent members of the "Board of Machne Israel and its parent organization." The assignment agreement contained no time constraints regarding the

start or completion of the construction of the school.

Subsequent to the execution of the assignment agreement, plaintiffs filed with the Third Circuit Court of Appeals a Motion to Recall and Reform Mandate, alleging fraud and misrepresentations by CIGNA. Said Motion was founded on the claim that certain "endorsements" were part of the CIGNA policy at the time the School was damaged by fire and that CIGNA made fraudulent misrepresentations that the policy did not contain those endorsements. Plaintiffs sought recall of the mandate so as to permit this Court to determine if plaintiffs were entitled to further compensatory damages or to punitive damages. Upon consideration of said Motion, the Third Circuit remanded the matter to this Court once again, for the limited purpose of making findings of fact raised by the Motion.

During the discovery period on remand, the parties settled the matter for a total of \$3.6 million. In the settlement agreement, executed on June 23, 1993, the parties agreed that CIGNA would withdraw its Motion to Recall and Reform the mandate of the Court of Appeals for the Third Circuit, that Beech Tree and Machne Israel would execute releases, and that all claims arising out of the insurance policy would be marked settled. CIGNA agreed to pay the settlement amount by check payable to Mr. Kates and Frederick Goldfein, "attorneys for Plaintiffs and Machne Israel, Inc." The parties agreed, further, that

allocation of the settlement would conform to the terms of a Proceeds Stipulation, executed concurrently, which would be approved by Order of the District Court.

The "Proceeds Stipulation" was executed on June 23, 1993 and was approved by Order of the District Court on June 24, 1993. In that agreement, the parties allocated the \$3,600,000 settlement as follows: (1) Beech Tree would receive \$725,000, in settlement of Beech Tree's punitive damages claim— \$180,000 of which was paid to Mr. Kates in legal fees; and (2) the remaining \$2,875,000, recovered pursuant to the policy claim, would be contributed to Machne Israel on the following conditions: (a) that the school would be named after Mr. Kates's parents and father-in-law (as specified in the assignment agreement); and (b) that construction would begin by June 1, 1994 and the school would be in use by December 31, 1995.

In the event any of the conditions were not met, the proceeds stipulation provided that the gift would lapse and would be returned by Beth Rivkah in the following way: (1) Mr. Kates would receive from Machne Israel a "fee" of \$997,500, plus costs he incurred;<sup>1</sup> and (2) Beech Tree would receive the "net proceeds" of the gift. The term "net proceeds" was defined as the total

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<sup>1</sup> According to the agreement, Machne Israel would pay 80% of Mr. Kates's costs, and Beech Tree would pay 20% of such costs. The 20% for which Beech Tree would be responsible was to be deducted from Beech Tree's share of the proceeds.

\$2,875,000 less Mr. Kates's fee. It amounts to \$1,877,500.

b. The Recovery Action:

When construction of the school had not been completed as required by the Proceeds Stipulation, the Dickler Group moved the District Court to enforce the Proceeds Stipulation on January 26, 1996. Again, Mr. Kates represented Beech Tree in this action, the "recovery" action. Electing not to enforce the Proceeds Stipulation at that time, the District Court exercised its equitable powers to modify the Proceeds Stipulation, extending the completion deadline to May 15, 1997. The Circuit Court affirmed the District Court's reformation of the Proceeds Stipulation on Sept 24, 1997.

In October, 1997, Mr. Kates, on behalf of Beech Tree, again alleged that the construction of the school had not been completed by the extended deadline and moved the District Court for enforcement of the modified Proceeds Stipulation. Mr. Kates passed away on January 11, 1998, and attorney Gary Rosen represented Beech Tree during the subsequent phases of the litigation.

On March 18, 1998, the District Court declined to grant an additional extension, and ordered Machne Israel to pay \$1,877,500 to Beech Tree and \$997,500 to Mr. Kates' estate, plus interest as set forth in the Proceeds Stipulation.

## **B. Facts Relating to Mr. Kates' Fee**

This case is further complicated by two facts: 1) Mr. Kates' fee is discussed in four documents with each document purporting to set a different fee for Mr. Kates; and 2) Mr. Kates is deceased.

### 1. The Various Provisions Regarding Mr. Kates's Fee:

The "fee" due Mr. Kates for services rendered, either on behalf of Beech Tree Run, Inc. or Machne Israel, is set forth in four documents. The parties' arguments are based on their respective interpretations of these provisions.

#### a. The Original Contingent Fee Agreement

The first document is an April 27, 1989 letter sent from Mr. Kates to Beech Tree Run, and later signed by Beech Tree (the "Original Agreement"). The Original Agreement provided that Mr. Kates's fee for representing Beech Tree Run, Inc. in Beech Tree Run, Inc. v. Pacific Employers Insurance Co., et al. would be "25% of the gross sums recovered by way of suit settlement and/or application less costs of litigation. Should there be a recovery of counsel fees, the amount of those counsel fees awarded and paid for by the defendant shall be added to the gross sums recovered less costs of suit..." The original fee agreement further provided that "[I]f this case should be resolved before trial commences, upon any suit instituted against the insurance carrier or other defendant(s) however, the fee to which I shall

be entitled ,...shall be 20%."

b.     The Assignment Agreement

The Assignment Agreement provided the following with respect to Mr. Kates's fee:

Lewis Kates has agreed to and does hereby waive his fee for services rendered in regard to and from Mochne [sic] Israel should the school be built . . . . Should, however, . . . . no school be built and/or . . . . named as aforesaid, Lewis Kates shall be paid a fee for services rendered equal to 35% of the gross recovery obtained or to be obtained by or on behalf of Machne Israel. . . ."

c.     The Proceeds Stipulation

The Proceeds Stipulation provided the following with respect to Mr. Kates's fee:

Lewis Kates and Lewis Kates Law Offices waive their fee, which is agreed to be 35% of the gross recovery allocated and given to Machne Israel, Inc. so long as all of the conditions concerning the construction and naming of the school . . . be complied with. Should there be a failure to comply with any of the condition [sic], Machne Israel, Inc. shall forthwith pay to Lewis Kates a fee of \$997,500.00.

d.     The Proposed Modification

The fourth document is a December 11, 1996 letter from Mr. Kates to Beech Tree Run, Inc. (the "Proposed Modification"), in which Mr. Kates wrote the following in response to Beech Tree's apparent request that Mr. Kates' fee for the recovery be \$100,000:

I have determined, in view of what has transpired, that I should not represent Mr. Dickler or Beech Tree Run, Inc. . . . unless it is agreed that I am to be paid an



appropriate fee from the recovery, if any, the Dickler Group obtains . . . . I agreed to represent the Dickler Group to obtain the \$1,877,500 to which it was entitled plus interest thereon for the fee that I had originally agreed to charge[,] 25% of the recovery it obtained. . . . I am not willing to represent Beech Tree Run, Inc. in its further endeavors unless you specifically agree that I be paid my agreed upon fee of any recovery that I obtain for you or Beech Tree Run, Inc., and that I be repaid, in any event, for all costs.

Beech Tree never signed the December 11, 1996 letter to verify Beech Tree's approval of its terms.

## **II. THE PARTIES' ARGUMENTS:**

Plaintiff, in its Motion for Partial Summary Judgment, moves that the Court make one of the following determinations: (1) that the Estate is entitled only to the \$997,500 expressly allocated to Mr. Kates in the Proceeds Stipulation; (2) that, if the Original Agreement applies, the Estate will receive twenty-five percent of the total recovery (i.e. twenty-five percent of \$2,875,000.00) and no more, rather than the \$997,500 allocated to Mr. Kates in the Proceeds Stipulation plus twenty-five percent of the \$1,877,500 allocated to Beech Tree; or (3) alternatively, plaintiff is only entitled to the \$997,500 allocated to Mr. Kates in the Proceeds Stipulation plus the value of the services rendered by Mr. Kates in obtaining the recovery for Beech Tree because Mr. Kates' untimely death precludes his recovery of a contingency fee.

Defendant, in its Motion for Summary Judgment, argues that

it should receive the \$997,500 allocated to Mr. Kates in the Proceeds Stipulation and, in addition, one of the following: (1) twenty-five percent of the \$1,877,500 allocated to Beech Tree, in the event the Court finds the Original Agreement still applied; (2) twenty percent of the \$1,877,500 allocated to Beech Tree, in the event the Court finds Beech Tree accepted the Proposed Modification; or (3) a sum calculated according to the value of services rendered by Mr. Kates in pursuing the enforcement of the Proceeds Stipulation.

In addition, defendant argues that plaintiff's legal malpractice claim should be dismissed. Plaintiff claims that Mr. Kates committed malpractice when he failed to make any provision in the Proceeds Stipulation for plaintiff's ability to recover, from Machne Israel, interest on the \$1,877,500. Defendant argues that such a claim is barred 1) by the statute of limitations; 2) because plaintiff cannot prove its case without expert testimony and plaintiff has not timely proffered any expert testimony as to legal malpractice; and 3) the evidence demonstrates that the omission of interest for plaintiff was in plaintiff's best interests.

### **III. ISSUES BEFORE THE COURT**

Because this litigation arises out of Mr. Kates' efforts to retrieve plaintiff's money after Machne Israel failed

to satisfy the conditions of the Proceeds Stipulation, the Court must decide what fee, if any, plaintiff owes defendant for those services.

To do so, the Court will first decide whether Mr. Kates fee is limited to the \$997,000 contained in the Proceeds Stipulation.

If the Court finds that Mr. Kates' fee was not limited to the \$997,000, the Court must next decide whether defendant is entitled to a contingency fee or a fee in quantum meruit.

Accordingly, the Court must decide whether Mr. Kates' premature death precludes defendant from recovering any contingency fee plaintiff may have owed Mr. Kates.

If, and only if, the Court finds that defendant is entitled to a contingency fee, the Court must decide whether that contingency fee is governed by the Original Agreement or the Proposed Modification. However, if the Court finds that defendant is not entitled to a contingency fee, it will not decide whether the Original Agreement or the Proposed Modification governs Mr. Kates' fee because both agreements provided that Mr. Kates would receive a contingency fee.

Finally, because Defendant moved for summary judgment on plaintiff's malpractice claim, the Court must further decide whether that claim is barred 1) by the statute of limitations; 2) because plaintiff cannot prove its case without expert testimony and plaintiff has not timely proffered any expert testimony as to

legal malpractice; and 3) because the evidence demonstrates that the omission of interest for plaintiff was in plaintiff's best interests.

#### **IV. LEGAL STANDARD**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c) (1994). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324.

A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974

F.2d 1358, 1363 (3d Cir. 1992).

Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

## **V. DISCUSSION**

### **A. Mr. Kates Fee is Not Limited to the \$997,000**

#### **Provided for in the Proceeds Stipulation**

Plaintiff argues that the Assignment Agreement and Proceeds Stipulation supersede the Original Agreement. Thus, according to the plaintiff, the parties intended that Mr. Kates' would only be entitled to the \$997,500 allocated to him in the Proceeds Stipulation, effectively replacing and nullifying the contingency fee provided for in the Original Agreement, or any other form of compensation for his services.

The Proceeds Stipulation would supersede the Original Agreement if its execution would make execution of the Original Agreement impossible. See Contempo Design, Inc. v. Chicago and Northeast Ill. Dist. Council of Carpenters, 189 F.3d 564, 573

(7th Cir. 1999) ("contract law provides that when two parties to a contract sign a subsequent inconsistent contract regarding the same subject matter, the first contract is superseded and the attendant duties are discharged."); see also Robert Grace Contracting Co. v. Norfolk & W. Ry. Co., 102 A. 956, 957 (Pa. 1918) ("[t]he extent to which a new contract supersedes the old depends upon the nature of the change and the intention of the parties."). The Court finds that the Original Agreement and the Proceeds Stipulation are not inconsistent.

First, it would not be impossible for the Original Agreement and the Proceeds Stipulation to set different fees for different parts of the same litigation. Plaintiff's argument that the money plaintiff gave to Machne Israel is the same money Mr. Kates recovered for it in the recovery action is irrelevant. Although the recovery action was a separate proceeding than the insurance dispute, had Mr. Kates chosen not to pursue plaintiff's money, plaintiff would have had to find some other way to pursue it—presumably by hiring another lawyer. Moreover, nothing in the Proceeds Stipulation evidences an intent for that agreement to supersede any prior agreements between the parties. Consequently, it would be inequitable not to compensate defendant for Mr. Kates' efforts in the recovery action when clearly plaintiff reaped the benefits of Mr. Kates' labor.

Finally, plaintiff argues that because Mr. Kates was already

pursuing his own money in the recovery action, Mr. Kates invested little "extra effort" into recovering defendant's money and should therefore not be entitled to a contingency fee. However, if defendant were entitled to a contingency fee, the Court would be very reluctant to judge the value of Mr. Kates' efforts when the parties entered into a contract governing his fee. Thus, the amount of "extra effort" Mr. Kates' invested in pursuing plaintiff's money is only relevant if Mr. Kates estate is ultimately to be compensated through quantum meruit.

**B. Mr. Kates' Premature Death Entitles the  
Estate to the Reasonable Value of Mr. Kates'  
Services, but not a Contingency Fee.**

Plaintiff argues that if defendant is entitled to a fee beyond the \$997,000 provided for in the Proceeds Stipulation, that claim should be limited to quantum meruit, and not a contingency fee. Plaintiff reasons that because Mr. Kates predeceased this Court's final judgment in the recovery action, Mr. Kates' estate is not entitled to a contingency fee because the contingency occurred after his death.

It is the rule in most jurisdictions that where the death of an attorney who was employed on a contingent basis occurs before a final adjudication or settlement of the case, his estate may recover the reasonable value of his services on the subsequent

successful termination of the litigation in his client's favor. See Roe v. Sears, Roebuck & Co., 132 F.2d 829, 831 (7th Cir.1943; Lewsader v. Wal-Mart Stores, Inc., 694 N.E.2d 191, 196 (Ill. 1998) (recognizing that trial court may use its equitable power to award fees to an attorney using equitable lien, quantum meruit, or other equitable device); Barnsdall v Curnutt, 174 P.2d 596, 600 (Okla. 1945) (holding in favor of the general rule); Neale v Hinchcliffe 189 P. 1116, 1117 (Ariz. 1920) (same); Morton v Forsee, 155 S.W. 765, 768 (Mo. 1913) (same); Sargent v New York Cent., & H. R. R. Co. 103 N.E. 164, 166 (N.Y. 1913) (same). Accordingly, the Court adopts the general rule in this case.

Mr. Kates passed away on January 11, 1998, just over two months before this Court granted plaintiff's Motion to Enforce the Proceeds Stipulation against Machne Israel. Consequently, Mr. Kates' estate cannot be entitled to the full contingency fee awarded plaintiff, but instead is entitled to the reasonable value of Mr. Kates services in the recovery action.

At this point, neither party has fully briefed nor argued the amount of money that equals the reasonable value of Mr. Kates' efforts in the recovery action. Thus, pursuant to this Order, the Court will hold a status conference with the parties to set a discovery schedule, a briefing schedule, and a final pre-trial conference date on the issue of the reasonable value of Mr. Kates' services.



Because Mr. Kates is not entitled to a contingency fee, the Court will not address whether the Proposed Modification, or the Original Agreement governed Mr. Kates efforts in the recovery action. Under either agreement, Mr. Kates death precludes defendant's recovery of a contingency fee.

**C. Plaintiff's Legal Malpractice Claim is  
Dismissed Because Plaintiff Failed to Proffer  
Expert Testimony to Prove its Case.**

Defendant also moves for summary judgment on the issue of whether Mr. Kates may have committed legal malpractice when he failed to secure interest on plaintiff's money in the Proceeds Stipulation. Defendant argues that plaintiff cannot satisfy its burden of proof with respect to the proper standard of care that Mr. Kates should have exercised because it has not proffered any expert testimony as to legal malpractice.

Under Pennsylvania law, the elements of a legal malpractice claim are: "(1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff." Schenkel v. Monheit, 405 A.2d 493, 494 (Pa. 1979). The standard of care to which an attorney must adhere is measured by the skill generally possessed and

employed by practitioners of the profession. See Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 480 (3d Cir. 1979); see also Collas v. Garnick, 624 A.2d 117, 120 (Pa. Super. Ct. 1993).

In a case of legal malpractice, negligence cannot be proven without expert testimony, except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons. See Lentino, 611 F.2d at 481. Lentino requires the plaintiff to establish the standard of care with expert testimony to avoid an involuntary dismissal or a directed verdict. See Gans v. Mundy, 762 F.2d 338, 343 (3d Cir. 1985).

In Gans, defendant-appellee alleged facts in its motion for summary judgment that it did not commit legal malpractice. The Gans Court stated that plaintiff-appellant then had the burden to produce expert evidence that would create a genuine issue of material fact as to the standard of care. See Gans, 762 F.2d at 343. Because plaintiff-appellant failed to produce such expert evidence when it opposed defendant-appellee's motion for summary judgment, the Court dismissed plaintiff's legal malpractice claim. See id.

In this case, like Gans, plaintiff has not proffered any expert testimony as to its legal malpractice claim. Instead,

plaintiff argues that its legal malpractice claim is simple, and thus no expert testimony is required. See Lentino, 611 F.2d at 481. It claims that Kates' failure to secure interest for plaintiff resulted from a conflict of interest between Kates' duties to plaintiff and Machne Israel.

Plaintiff's argument relies on the conclusory allegation that the conflict of interest would be so obvious, that no expert testimony would be needed to establish it. However, the Third Circuit has held that "a party resisting a [Rule 56] motion cannot expect to rely merely upon bare assertions, conclusory allegations or suspicions." Ness v. Marshall, 660 F.2d 517, 519 (3d Cir.1981). Thus, plaintiff's allegation is insufficient to withstand defendant's motion for summary judgment.<sup>2</sup> Furthermore, the Court cannot conclude that an alleged conflict of interest is such a simple matter that no expert testimony would be required to prove it's [il]legal existence.

Nonetheless, as plaintiff argues in its own motion for summary judgment, this Court has already determined that Mr. Kates did not represent Machne Israel, and Mr. Kates did not have a conflict of interest when representing plaintiff. On June 24,

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<sup>2</sup> Plaintiff claims in footnote 3 of its Response to Defendant's Motion for Summary Judgment that defendant's expert report is sufficiently favorable to plaintiff's claim that it amounts to a sufficient foundation for plaintiff's legal malpractice claim. However, this argument also amounts to a mere assertion, and the Court does not find it persuasive.

1993, when this Court found that the Proceeds Stipulation was valid and enforceable, this Court rejected that contention when it said:

Despite this serious allegation of unconscionability, Machne Israel presented at the hearing no testimony whatsoever evidencing that Lewis Kates forced Machne Israel to sign the Proceeds Stipulation or engaged in any other "unconscionable act." In fact, the Proceeds Stipulation itself indicates that Lewis Kates did not represent both the movants and Machne Israel in June, 1993. In addition to the signature of Lewis Kates, the Proceeds Stipulation contains the signature of Frederic L. Goldfein, under which is written "Frederic L. Goldfein, Goldfein & Joseph, Attorneys for Machne Israel, Inc... . Accordingly, this Court does not find the Proceeds Stipulation to be unenforceable on this ground.

Accordingly, the Court finds that plaintiff's malpractice claim should be dismissed because plaintiff has not proffered any expert testimony to prove its claim.

An appropriate order will follow.

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Clarence C. Newcomer, S.J.